



Federal Communications Commission
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Re: W46EB (formerly W46DM)
Arbury Hills, Illinois
File Nos. BLTTL-20030902AAQ;
BESTA-20070515ADY;
BMPTTL-20061024AFI; and
BLTTL-20060607AAR
Facility ID No. 61692

Dear Counsel:

This is with respect to the petition for reconsideration of the staff's May 8, 2006 letter decision dismissing the above-referenced application for a license to cover the displacement construction permit for low power television station W46EB, Arbury Hills, Illinois, authorized to Marcia Cohen. WCIU-TV Limited Partnership, a subsidiary of Weigel Broadcasting Co. and the licensee of WCIU-TV, Chicago, Illinois (collectively, "WCIU"), opposes grant of reconsideration. We also have before us pending applications for the extension and licensing of a Special Temporary Authorization (STA) held by Cohen for channel 46, as well as a pending application for modification of her channel 46 construction permit. These applications are also opposed by WCIU, which has filed an application for a digital companion channel for its station WFBT-CA on channel 46 in Chicago.¹

For the reasons set forth herein, we will deny Cohen's petition for reconsideration and dismiss the pending applications. The channel 46 construction permit having expired on June 11, 2006, we also cancel the call sign and delete the permit. Cohen may continue to operate from her licensed facility on channel 52 in Champaign-Urbana, Illinois.

¹ File No. BSFDTL-20060630CUY.

Background and Pleadings. Cohen acquired the license for low power television station W52BR, Champaign-Urbana, from Specchio Developers, Ltd. on October 23, 2002.² That station was authorized to operate on channel 52 from a 108 meter tower approximately 10 kilometers southeast of Champaign, with a directional antenna and effective radiated power (ERP) of 29.1 kW. Less than a month after acquiring the station, Cohen filed a displacement application pursuant to Section 73.3572(a)(4)(ii) of the Commission's rules,³ which provides that a low power television station authorized on an out-of-core channel (channels 52 to 69) may file a displacement application to change output channel at any time. In addition to a change in channel, the rule also permits such displacement applicants to propose "any technical modifications which are necessary to avoid interference or continue serving the station's protected service area."⁴ In considering a request for a waiver of the requirement that the proposed displacement facilities continue to serve the station's service area, the burden is on the applicant to prove that there is no channel available in the same area, using the same technical parameters as its displaced facility and at its existing site, with which it can replicate its pre-displacement coverage area.

The displacement construction permit application proposed a facility on channel 46, with the maximum allowable ERP of 150 kW⁵ and an omnidirectional antenna. While the application specified Arbury Hills, Illinois as the proposed community of license, Cohen did not disclose that Arbury Hills was located over 123 miles from the station's licensed site, and that because there would be no contour overlap between the licensed and proposed facilities, none of the station's present viewers would continue to receive service under the new proposal. Nor did Cohen address the technical necessity of increasing the proposed ERP more than five-fold and changing to an omnidirectional antenna, in order to avoid interference. Under these circumstances, the staff should have dismissed the application as not substantially complete,⁶ or as a major modification application filed outside a specified filing window.⁷

The staff, however, incorrectly granted the application on June 11, 2003. When it became aware of its error, the staff attempted to rescind the grant. Because the grant had become final,⁸ however, the staff's recession of the grant was set aside by public notice dated August 19, 2003.⁹ The public notice conditioned that action "on the submission, within fifteen (15) days, of documentation demonstrating the

² File No. BALTTL-20020820ACF.

³ 47 C.F.R. § 73.3572(a)(4)(ii).

⁴ When it adopted channel change rules for low power television stations displaced by DTV stations, the Commission stated that the policy was meant "to allow low power stations that are displaced by new DTV stations to apply for a suitable replacement channel **in the same area** without being subject to competing applications." *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14652 (1997) (emphasis added). See also *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, 13 FCC Rcd 21578, 21583 (1998).

⁵ See 47 C.F. R. § 74.735 (a)(2).

⁶ 47 C.F.R. § 73.3564.

⁷ 47 C.F.R. § 73.3572(a)(4)(v). The Commission has imposed geographic restrictions on the filing of new station and major change applications, only permitting applications that specify transmitter sites located more than 121 kilometers (75 miles) from the reference coordinates of highly populated cities, such as Chicago. See *Public Notice, Scheduling of Limited Low Power Television/Television Translator/Class A Television Auction Filing Window from July 31 through August 4, 2000*, 15 FCC Rcd 10854 (2000), *erratum*, 15 FCC Rcd 10854 (2000). These restrictions are necessitated by the Commission's implementation of the digital television (DTV) service and by the large number of low power television/television translator stations already authorized in and around these cities. Cohen's construction permit application specified a transmitter site less than two miles from the reference coordinates for Chicago.

⁸ 47 C.F.R. § 1.108.

⁹ Broadcast Actions, Report No. 45552, released August 19, 2003.

necessity of moving the W52BR transmitter site more than 123 miles from its authorized site and no longer serving the station's protected service area."¹⁰

Cohen submitted several hundred pages of print-outs, purporting to show that no other channel, location and design would result in an in-core channel for W52BR that met all the interference protection requirements, as well as a "useable facility."¹¹ The staff concluded, however, that a number of aspects of the submitted study were flawed. For example, in addition to the tower on which W52BR was located, the submitted study considered only four other existing towers, located between 44 and 83 miles from the licensed Champaign site. Commission records show, however, that there are at least 17 registered towers within 45 miles of the licensed Champaign site, including towers used by W07DD (1.3 miles), WBXC-CA (6.2 miles), W39BH (6.6 miles), WCIA(TV) (8.7 miles), W65CZ (11 miles), WILL(TV) (21.1 miles) and WICD(TV) (22.8 miles). None of these towers were considered as part of Cohen's submitted study, as required by Commission policy that displacement facilities continue to serve the same area as the displaced facilities.¹² In addition, the staff determined, using the engineering software and data available to the public on the Media Bureau's website, that the operation on channel 38 from the licensed W52BR site, with a directional antenna and an ERP of 29.1 kW, would comply with the Commission's interference protection rules and fully replicate the service area of W52BR.

Cohen filed the above-captioned license application on September 3, 2003, certifying that the facility was constructed as authorized in the underlying construction permit, which proposed the use of a directional composite antenna, Model UP-6-SL, manufactured by Superior Broadcast Products, with a transmitter output power of 2.8 kW. On March 22, 2006, while the license application was pending, agents from the FCC Enforcement Division's Chicago office conducted an inspection of the station. They observed that the utilized antenna was not the antenna authorized in Cohen's construction permit, and that the transmitter was operating at 98% of its maximum rated power of 10 kW. Because the filing of an FCC Form 346 modification application is required for any change in a low power television station's transmitting antenna system, including the use of a different antenna than that authorized,¹³ the staff dismissed the license application by letter dated May 8, 2006. The staff did, however, permit Cohen to file for an STA to continue to operate at a variance from her authorized construction permit.

The following day, Cohen filed for an STA, which was granted on May 17th. Cohen did not, however, prior to expiration of her construction permit, construct her authorized facility and file a license to cover, or seek modification of her construction permit to conform to her constructed facility. Instead, five days before her permit expired, Cohen filed a petition for reconsideration of the dismissal of her license application, arguing that because her station was constructed "almost to the exact specification contained in her original application," the staff erred in dismissing the application pursuant to Section

¹⁰ The Commission has the authority, pursuant to Section 403 of the Communications Act, "to institute an inquiry, on its own motion, in any case and as to any matter or thing . . . before the Commission by any provision of this Act . . ." Cohen filed a petition for reconsideration of the reporting condition imposed in the public notice, arguing, *inter alia*, that Section 312 of the Communications Act and the Commission's rules require that she be given an opportunity to defend her construction permit at hearing prior to it being revoked. The issue raised in the petition, however, was not ripe for review because no order had been adopted which affected her right to a hearing. In any event, even if the petition had been procedurally valid, because her construction permit has expired by operation of law, any such petition would be moot.

¹¹ See Cohen's August 20, 2003 submission at 1.

¹² See *Sixth Report and Order*, 12 FCC Rcd at 14652.

¹³ 47 C.F.R. § 74.751(b)(2), requires that "Formal application (FCC Form 346) is required for . . . any change in the transmitting antenna system, including the direction of radiation, directive antenna pattern, antenna gain, transmission line loss characteristics, or height of antenna center of radiation."

74.751(b)(2). While Cohen admitted that there was a change in the transmitter output power and antenna gain at the station, she argued that because this information is not required by either FCC Form 346 or FCC Form 347, these changes cannot serve as the basis for dismissing her license application.

WCIU filed an opposition on June 16, 2006, supporting the staff's dismissal of the license application.¹⁴ WCIU argued that the station Cohen constructed is not "almost the same" as the one she proposed; the antenna Cohen used is a different model made by a different manufacturer, with a different antenna gain, polarization, and required transmitter power output. WCIU further alleged that Cohen engaged in various misrepresentations in connection with the prosecution of her applications, specifically, by filing an "improper" displacement application, and making false certifications and misrepresentations.¹⁵ Cohen filed a reply on July 6, 2006, arguing that WCIU failed to make a *prima facie* showing that she intended to deceive the Commission. She further stated that she is not an engineer, and was entitled to rely upon the advice of her engineering consultants regarding the construction of the station. Finally, she again argued that because the proposed and utilized antenna produce antenna patterns "which are virtual duplicates," and the station was constructed "almost to the exact specifications contained in her original application," the Commission should grant the license application as being in conformance with the rules.

Cohen also filed a "license to cover" her STA on June 6, 2006. On September 12, 2006, Weigel filed a "Petition for Immediate Termination of Special Temporary Authority and Dismissal of Application for 'License to Cover' Special Temporary Authorization," asserting that because Cohen's underlying construction permit had expired on June 11, 2006, the STA was no longer valid, citing Section 73.1635(a) of the rules.¹⁶ Weigel also argued that Section 319 of the Communications Act of 1934, as amended, does not permit the issuance of a broadcast station license where no construction permit authorization exists. In response, Cohen argued that her license application remains pending, since she filed a petition for reconsideration, and thus, that her construction permit was not expired. She also cited a number of cases where facilities were constructed at a variance from those specified in the station's authorization, which resulted in imposition of a forfeiture, rather than cancellation of the license, claiming that she was entitled to the same treatment. Weigel filed a reply on October 10, 2006, arguing, *inter alia*, that Cohen's reliance on her cited cases is misplaced, and that there are no equitable circumstances which would justify reinstating and granting her license application.¹⁷

Discussion. Section 74.751(b)(2) clearly required Cohen to have filed a modification application for authorization to construct the facilities which were actually built. She admits on reconsideration that she constructed using a different antenna than authorized, which changed the station's transmitter output power and the antenna gain. Cohen argues, however, that "the language of Section 74.751, cited in the staff dismissal letter, needs to be applied in a manner which separates the inconsequential from the more

¹⁴ We agree with WCIU that, because the field inspection by the FCC which resulted in the dismissal of Cohen's license application, could not have been discovered by WCIU prior to the Commission's dismissal action, good cause exists for its failure to participate at an earlier stage in the proceeding.

¹⁵ In its series of pleadings, WCIU demonstrated that at the time Cohen filed her displacement application, there were at least five other in-core channels available that could replicate the licensed W52BR protected service area.

¹⁶ That rule provides that an "STA is authority granted to a permittee or licensee to permit the operation of a broadcast facility for a limited period at a specified variance from the terms of the station authorization . . ."

¹⁷ A number of other pleadings were filed in connection with the May 17, 2006 grant of Cohen's initial STA, the filing and grant of Cohen's application for renewal of her STA (File No. BESTA-20061109ADU, granted November 13, 2006) and the pending STA extension application (File No. BESTA-20070515ADY). These pleadings were considered but not specifically mentioned herein.

substantial changes warranting thorough scrutiny by the public and the Commission,” citing *Ted Tucker and Jana Tucker*, 4 FCC Rcd 3625, 3628 (1999). That case is inapposite. *Tucker* involved the issue of whether the Tuckers’ application to change the antenna system for an FM translator station, from a directional to omni-directional antenna and reduce effective radiated power, should be classified as a major or minor change application pursuant to Section 73.3573(a)(1).¹⁸ This issue arose because the Tuckers’ filed their modification application five days after the Commission’s implementation of a freeze on the acceptance of applications for new commercial FM translator stations and for major changes in the facilities of existing FM translator stations.¹⁹ The case did not involve Section 74.751 of the Rules, which requires that changes in the transmitting antenna system of a low power television station be made by filing an FCC Form 346 modification application. Moreover, in *Tucker*, there was no question that the change in the FM translator station’s antenna system had to be authorized through the filing of a modification application, and **not** in a license application.²⁰ *Tucker* did not hold the low power television stations could construct facilities other than those authorized, without filing a modification application prior to construction. Accordingly, we conclude that the staff correctly dismissed the license application.

We also conclude that Cohen’s construction permit for channel 46 is expired. Under the rules in effect now and at the time Cohen’s application for a construction permit was granted, a permittee must complete construction of an authorized facility no later than three unencumbered years after the grant of the original permit.²¹ After three unencumbered years, the construction permit expires as a matter of law.²² This period can be “tolled” for certain enumerated “encumbrances” beyond the permittee’s control, as follows: acts of God, administrative or judicial review of a permit grant, failure of a condition precedent on the permit, or judicial action related to necessary local state and federal requirements.²³ The Commission has also recognized that there may be “rare and exceptional circumstances beyond a permittee’s control” other than those delineated above that could warrant a waiver of the construction period rule.²⁴ Requests for tolling must be filed within 30 days of the event upon which the request is

¹⁸ That rule set forth processing guidelines for FM translator station applications, and at the time the Tuckers filed their application, the rule defined a major change application as one that proposed a change in output channel or the community or area the translator was authorized to serve. *Tucker*, 4 FCC Rcd at 3626. While the Tuckers only proposed to modify the antenna system, the Commission found that since the proposed facility substantially surpassed the area served by the licensed facility, the application constituted a major change application subject to the freeze.

¹⁹ *Id.*

²⁰ In *Tucker*, The Commission also recognized that the imposition of the freeze could bar proposed modest changes to the transmitting facilities of FM translator stations, which would incidentally result in some change in service area. Accordingly, in order to “separate the inconsequential and unavoidable changes in area from more substantial changes which warrant thorough scrutiny . . . for the purpose of administering [modification applications], we generally will consider a proposal to be a minor change if at least 90% of the area within the proposed 1 mV/m contour is encompassed by the previously authorized 1 mV/m contour.” *Id.* Notably, the Commission did not hold, as Cohen suggests, that minor changes to an FM translator station’s transmission antenna system could be made without seeking prior authorization.

²¹ See 47 C.F.R. § 73.3598(a). See also 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Report and Order, 13 FCC Rcd 23056, 23092 (1998) (“Streamlining Order”), *aff’d*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539-40 (1999) (“Streamlining MO&O”).

²² See 47 C.F.R. § 73.3598(e) (“Any construction permit to which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”)

²³ See 47 C.F.R. § 73.3598(b).

²⁴ See *Streamlining MO&O*, 14 FCC Rcd at 17541; *Texas Grace Communications*, 16 FCC Rcd 19167 (2001).

based,²⁵ and requests for waiver of the construction period review must be filed as soon as possible after the event, generally within the same 30-day period applicable to tolling requests.²⁶

Cohen's construction permit expired on June 11, 2006. We note first, that Cohen did not file a tolling request.²⁷ Instead, Cohen argues that the permit is still valid because the "Commission's action dismissing the [license] application is not yet final and has been challenged by Cohen."²⁸ Even if this argument had been made in a timely and procedurally correct tolling request, Cohen would not be entitled to tolling because the permit was not encumbered by "administrative review." For tolling-related purposes, the rules define administrative review as consideration of "petitions for reconsideration and applications for review of the grant of a construction permit."²⁹ Here, Cohen contends that her construction permit is still outstanding because her petition seeking reconsideration of the denial of her application to license her unauthorized construction is still pending. The Commission has specifically held that such a petition does not constitute tolling.³⁰

We also note that Cohen did not request a waiver of the three-year construction term, and we find no basis for granting a waiver on our own motion. In order to justify a waiver of the three-year construction term, a permittee must demonstrate that "rare and exceptional circumstances" beyond its control prevented timely construction.³¹ Cohen has shown no such circumstances here. As was the case in *KSBN Radio*, Cohen's inability to build within the time allotted was due to her own "poor choices." Like the permittee in *KSBN Radio*, Cohen, without prior Commission approval, constructed an unconventional and unauthorized facility. Then, when the license application was dismissed, rather than construct the authorized facilities, or file a modification application, she did nothing to bring the station into compliance.³²

Finally, Cohen cites three cases where station facilities were constructed at a variance, and the Commission issued a forfeiture, rather than revoke the station license. Cohen argues, accordingly, that while "constructing facilities at a variance from those specified in the applicable authorization, while certainly regrettable, hardly constitutes a crime of such magnitude as to warrant the death penalty as

²⁵ See 47 C.F.R. § 73.3598(c).

²⁶ See *Birach Broadcasting Corporation*, 18 FCC Rcd 1414, 1416 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005).

²⁷ Cohen did argue, in a September 7, 2006 pleading, that she would have filed a minor change application, but that the Commission imposed a freeze on the filing of minor change applications. See *Announcement of Filing Window for LPTV and TV Translator Digital Companion Channel Applications from May 1, 2006 through May 12, 2006*, DA 06-123 (released January 26, 2006) (imposing freeze from April 3, 2006 through May 12, 2006; subsequently extended through June 30, 2006). She did not, however, request tolling of her construction permit. See *Lauren A. Colby, Esq.*, 21 FCC Rcd 1260, 1261 (AD 2006) ("Tolling or waiver of a station's construction permit is triggered by a notification from the permittee; such action does not occur automatically.") Even if she had timely requested tolling, and the tolling request was granted, the freeze, which lasted 89 days, would only have extended her construction permit until September 7, 2006. Cohen did not file a minor change application until October 24, 2006.

²⁸ See Cohen's January 5, 2007 Opposition to WCIU's Petition for Reconsideration of the grant of an extension of her STA at 6.

²⁹ 47 C.F.R. § 73.3598(b)(ii).

³⁰ See *KSBN Radio, Inc.*, 19 FCC Rcd 20116, n. 37 (2004) (a petition for reconsideration of the denial of an application to license an unauthorized antenna system does not constitute a tolling event); see also *Texas Grace Communications*, 16 FCC Rcd 19167, 19178 (2001) (staff consideration of permittee's own petition for reconsideration of a denial of tolling not considered administrative review such that the permit is tolled.)

³¹ *Streamlining MO&O*, 14 FCC Rcd at 17541.

³² We give no consideration to Cohen's "license to cover" her STA. WCIU is correct that Section 319 of the Act does not permit the issuance of a broadcast license where no construction permit authorization exists.

[WCIU] would have it.” In *Lauren A. Colby*, 21 FCC Rcd 1248 (AD 2006), the permittee was authorized to construct a Class C2 FM station but instead constructed a Class A station at a much lower power. Unlike Cohen, in *Colby* the permittee disclosed in its license application that it had constructed at a variance and filed a series of modification applications in order to bring the facility into compliance. In *Manahawkin Communications Corporation*, 17 FCC Rcd 342 (2001), the permittee was sanctioned for premature construction because it constructed its proposed facility prior to the actual grant of its modification application, unlike Cohen, who never filed a modification application. Finally, in *Spectrum Broadcasting Corporation*, 12 FCC Rcd 7724 (1997), the Media Bureau issued a Notice of Apparent Liability to the licensee of an FM radio licensee. Unlike Cohen, the licensee in *Spectrum Broadcasting Corporation* disclosed in its license application that it had constructed nonconforming facilities and simultaneously filed a modification application to come into compliance. Moreover, none of these cases involved Section 74.751(b)(2), which applies to low power television stations and required Cohen to file a minor modification to make antenna system changes at variance with her construction permit authorization before filing a license to cover application, or Section 73.3598(b)(ii), which required Cohen to construct her authorized facility within 3 years from the date of the issuance of her construction permit.

Outstanding Character Issues: It appears from the record before us that Cohen may have: (1) lacked candor in filing her application for channel 46 as a displacement application, and in responding to the staff’s request for further information supporting her claim that the technical modifications proposed in the application were necessary to avoid interference; (2) made false certifications in her license application; and (3) made various misrepresentations in prosecuting her applications. In addition, in a July 26, 2006 supplement, WCIU provided the uncontroverted declaration, under penalty of perjury, of Daniel M. Barton, regarding events immediately preceding the filing of Cohen’s license application. According to Barton, Cohen’s station was initially constructed with an antenna fabricated by Barton the weekend before she filed her license application,³³ and not with the antenna which Cohen claimed on reconsideration was virtually identical to her authorized antenna. Because the channel 46 construction permit has expired however, we need not, and do not, consider at this time whether Cohen is qualified to remain a Commission licensee on channel 46. Cohen remains the licensee of W52BR, however, and we will consider these unresolved character issues in connection with any future displacement application she files.³⁴

In view of the foregoing, the petition for reconsideration filed by Marcia Cohen IS DENIED. The construction permit having expired, the above-referenced applications ARE DISMISSED, and the call sign IS DELETED. Cohen is directed to cease operations on channel 46 within five business days from the date of this letter, and to remove the channel 46 antenna and transmission lines from the AON tower within 15 business days from the date of this letter.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

³³ See WCIU’s July 28, 2006 Supplement to Opposition to Petition for Reconsideration, Attachment I.

³⁴ Cohen is also the licensee of WNAI-LP, Springville, New Jersey.